DOCUMENT RESUME

ED 237 980 CS 207 746

AUTHOR Griswold, Bill
TITLE Communicative Competence and Commercial Speakers: Applying Habermas in a First Amendment Issue.
PUB DATE Aug 83
NOTE 28p.; Paper presented at the Annual Meeting of the Association for Education in Journalism and Mass Communication (69th, Corvallis, OR, August 6-9, 1983).
PUB TYPE Reports - Research/Technical (143) -- Speeches/Conference Papers (150)

EDRS PRICE MF01/PC02 Plus Postage.
DESCRIPTORS *Communication (Thought Transfer); Communication Skills; Court Litigation; *Freedom of Speech; Intellectual History; Journalism; Laws; Media Research; *Politics; *Public Speaking; Social Problems; *Social Science Research
IDENTIFIERS Critical Theory; *First Amendment; *Habermas (Jurgen); Theory Development

ABSTRACT

Noting that the work of Jurgen Habermas has had an important influence on philosophy and the social sciences recently, this paper examines the implications of using Habermas's "ideal speech situation" as a criterion for deciding issues relating to the First Amendment. The paper first briefly reviews the distinctive features of critical theory, Habermas's work, and his notion of communicative competence. It then explores a specific issue in First Amendment law--the "commercial speaker" issue first raised in "First National Bank of Boston v. Bellotti"--and offers a detailed review of the case and the historical background and philosophical assumptions on which it was decided. Finally, the paper examines the implications of Habermas's communicative competence theory as it might be applied at a societal level. (FL)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED237980

Qualitative Studies

"Communicative Competence" and "Commercial Speakers": Applying Habermas in a First Amendment Issue

U.S. DEPARTMENT OF EDUCATION
NATIONAL INSTITUTE OF EDUCATION
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

X This document has been reproduced as received from the person or organization originating it.
Minor changes have been made to improve reproduction quality.

• Points of view or opinions stated in this document do not necessarily represent official NIE position or policy.

by

Bill Griswold

Graduate Student

School of Journalism

University of Minnesota

"PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY

Bill Griswold

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)"

Presented to the Qualitative Studies Division, Association for Education in Journalism Annual Convention, Corvallis, Oregon, August 1983.

CS 207746

The work of Jurgen Habermas has had an important influence on philosophy and the social sciences recently. His concept of communicative competence, particularly, has been applied in a number of fields. In the last year, for instance, Fred Dallmayr has noted that the work of Habermas was essential to Dallmayr's efforts to establish a critical phenomenology for political science.[1] However, Habermas' ideas have not yet been applied to analysis of how the system of communication of political ideas in the United States is regulated through the First Amendment to the U.S. Constitution.

This paper will examine the implications of using Habermas' "ideal speech situation" as a criterion for deciding issues relating to the First Amendment. Habermas moved far from his original intellectual ties to the Frankfurt School of critical theorists, so far in fact that one Marxist historian dismisses Habermas' work since 1960 as unrepresentative of the Frankfurt School.[2] Nevertheless, in order to appreciate the development of Habermas' theory of communicative competence, it is necessary to note the broad principles of critical theory founded in the Institute for Social Research. Therefore, the first part of this paper will be a brief sketch of the distinctive features of critical theory. Habermas' work, and particularly his notion of communicative competence,

then will be outlined in relation to critical theory.[1] The paper then will examine a specific issue in First Amendment law--the "commercial speaker" issue first raised in First National Bank of Boston v. Bellotti.[3] The case will be reviewed in detail, and the historical background and philosophical assumptions on which it was decided will be outlined. Finally, this paper will examine the implications of Habermas' communicative competence theory as it might be applied at a societal level.

This paper is not intended to introduce a comprehensive theory of public opinion and the role of the First Amendment from the perspective of Habermas' work. The development of Habermas' theory is by no means complete, and Habermas himself has not been entirely consistent in his approach to a social theory of communication.[4] Nevertheless, Habermas' works are rich and provocative, and their application to problems of communication law should not be neglected any longer. It is hoped that this paper can stimulate further efforts in this direction.

THE FRANKFURT SCHOOL AND CRITICAL THEORY

The Institute for Social Research was created Feb. 3, 1923, as an independent institution loosely affiliated with the University of Frankfurt. The major intellectual impetus for the establishment of the Institute grew from two major currents of German thought after World War I: the belief of many upper- and middle-class Germans that Western civilization

was declining, and the disillusionment of Marxists because of the split between the German Communist Party and the Socialist Party.[5] The Institute for Social Research was intended as a means of bringing together left-wing intellectuals who could advance the study and rehabilitation of Marxism in a setting independent of university politics. The Institute eventually was a working home for many scholars who have been influential on Western European thought in the last 50 years: Max Horkheimer, Walter Benjamin, Theodor Adorno, Erich Fromm, Franz Neumann, Herbert Marcuse and Habermas.

The history and development of the Frankfurt School, its forced retreat from Nazi persecution in Germany, association with Columbia University in the United States through World War II, and subsequent return to Frankfurt in 1949, have been well documented.[6] The major works of the major figures of the Frankfurt School and their followers also have been reviewed elsewhere.[7] No attempt to detail these matters will be made here; for the purpose of this paper it is sufficient to note what Hubert Rottleuthner calls the three distinctive features of critical theory:

1) Critical theory is essentially normative. Its fundamental aim is to change society. The critical theorist does not see himself as merely a student and describer of events, but as an involved political member of the society he is studying. There is "but one central critical tool, namely the confrontation of the existing social reality with the norms and ideals that are claimed to be realised."[8]

2) The Frankfurt School uses the philosophy of history expressed as the "dialectic of the Enlightenment."[9] This view of history asserts that man has become alienated from nature through his increasingly technical mastery of external events. The primary concerns of human knowledge have become dominated by scientism and positivism. However, the manipulation of nature by man has not led to freedom but to manipulation of most men by other men.

3) The critical theorists' goal always is to develop a comprehensive theory of present society as a unique combination of historical and social forces. The Frankfurt School scholars appropriated much of Marxist doctrine, but the systematic study of political economy that was becoming more and more scientific and positivistic in Eastern Europe never attracted them. The major tenet of Marxism that guided critical theorists was the notion that in present capitalist societies the principle of exchange penetrated all human relationships and dominated their structure. Horkheimer and Adorno especially observed the increasing power of administrative mechanisms, leading to the supremacy of society over individual and the disappearance of personal autonomy.[10]

Rottleuthner observes that the major figures of the Frankfurt School did not deal specifically with socio-legal theory.[11] However, several of their followers have begun to apply many of the principles of critical theory to sociology of law. Karl Renner, for instance, has concluded that "legal and economic institutions, though not identical, are but two

aspects of the same thing, inextricable interwoven."[12] And Thomas Mathiesen cites historical research to support his argument that material structure precedes and determines the shape of law in society.[13]

Another field with which critical theorists have been concerned is communication. Of the major Frankfurt School figures, Friedrich Pollock, Adorno, Benjamin and Horkheimer all wrote about the "culture industry" and how its shortcomings are determined by the relations of production of cultural goods in society.[14] Marcuse more recently has been critical of the mass media in the United States: "The mass media are under the thumb of corporate capitalism and have stifled the case for radical change. . . . The media have convinced the masses that they should defer to capitalism's domination and defend the system that enslaves them."[15] Other writers, influenced by critical theory, have moved toward more detailed critiques of mass communication processes. Claus Mueller, for instance, has studied patterns of "distortion" in the structure of communications and finds direction, control and constraint in nearly all political environments.[16] Hans Enzensberger has proposed decentralizing and monitoring communication channels in order to more fairly allocate control of the production and dissemination of social messages.[17]

Despite this attention to law and to communication, there has been no attempt to define a critical theory perspective on the law of communication. Habermas' theory of communicative competence offers a means of beginning such a definition.

HABERMAS' THEORY OF COMMUNICATIVE COMPETENCE

Jurgen Habermas was born in 1929. He studied at the universities of Gottingen, Zurich and Bonn. After receiving his doctorate, he served as either research fellow or professor at the universities of Frankfurt am Main, Marburg, and Heidelberg. He is now director of the Max Planck Institut in Starnberg.[18]

A European contemporary calls Habermas "the most original and distinguished of the present generation of West German philosophers."[19] However, Habermas' works have been written mainly in German and have appeared in a wide variety of sources, so they have been relatively slow in gaining attention in the United States.

In his early works, Habermas undertook a re-examination of the basic ideas and problems of critical theory. In Theory and Practice, for instance, he included essays on "Hegel's Critique of the French Revolution," "On Hegel's Political Writings," "Marxism as Critique," "Natural Law and Revolution" and "On Theory and Practice in Our Scientific Civilization."[20] In Legitimation Crisis, he examined why legitimation becomes a major problem under conditions of advanced capitalism, using a systems approach to social relations.[21] In Toward a Rational Society, Habermas notes, "The depoliticization of the mass of the population and the decline of the public realm as a political institution are components of a system of domination that tends to exclude practical questions from public discussion."[22] Some of his further observations on political communication are

paraphrased by Hohendahl: "Because, on the one hand, the state intervenes in the social system to resolve social conflicts and, on the other, various interest groups assert their demands in the public sphere, the classical function of public opinion as the advocate of general interest is increasingly undermined."[23]

Habermas also became the major spokesman for critical theory in a debate with the positivists that was renewed in 1961 and has continued in Western Europe since.[24] However, the work by Habermas that has attracted most attention in many areas is his development of a theory of communicative competence.[25] The following discussion of this theory draws heavily on the summaries by Rottleuthner and Thomas McCarthy.[26]

In developing a social theory based on language, Habermas begins with the assumption that the study of human society is necessarily the study of communicative acts, since the exchange of symbolically mediated interaction is the process that distinguishes humans from other forms of nature. Habermas differs with Chomsky's theory of linguistic competence, which assumes that the components of meaning exist in the linguistic abilities of a competent speaker, that the components of meaning must therefore exist prior to all experience. In contrast to the empirical pragmatics of psycho-linguistics and socio-linguistics, which is concerned with the extra-linguistic, empirical and contingent conditions of actual communication, Habermas proposes a system of universal pragmatics, undertaking the investigation of general structures which appear in every

speech act and which are produced through the performance of linguistic expressions. "With the successful completion of a speech act, an interpersonal relationship between two competent actors is simultaneously produced and represented."[27]

Habermas contends that every utterance that is part of a speech act can be divided into a propositional content and an illocutionary force. "For example, in the utterances: 'I assert that p,' 'I promise that p,' 'I command that p,' the same propositional content (p) appears with varying illocutionary force."[28] In a sense, then, every utterance contains two sentences: the dominating sentence that establishes the illocutionary force of the utterance, and the dependent sentence connects the communication with the world of objects and events. The connection between the dominating sentence and the dependent sentence, Habermas says, depends on the pragmatic established by the illocutionary force of the utterance. The task Habermas set for himself then was to isolate the universal pragmatic structures in all utterances.

Habermas notes first that in everyday speech the pragmatic features of an utterance often are not verbalized. If a person says "I am going," for instance, he may mean either "I assert that I am going," "I promise that I am going," or "I threaten that I am going." Nevertheless, it is always possible to express the pragmatic element through the use of what Habermas called dialogue-constitutive universals, of which there are five classes:

(a) personal pronouns and their derivatives, and

> (b) forms of address and speech introduction (vocative, greeting, etc.), which are correlated with the general structure of the roles assumed by speakers, hearers and potential participants in the communication; (c) deictic expressions (expressions of place and time, articles, demonstratives, etc.), which are correlated with the place and time of the utterance, the perceptual field of the speakers/hearers, as well as with the objects of possible predication; (d) performative verbs (assert, promise, command, etc.), which determine the sense of the utterance as such, the speakers' relation to this utterance, and the relation of speaker to hearer; (e) non-performative intentional verbs and some modal verbs, which are correlated with the intentions and attitudes of the speaker.[29]

These dialogue-constitutives are the pragmatic universals of utterances, according to Habermas. He views a theory of communicative competence, or universal pragmatics, as a way of working out the logic of combinations of these pragmatic universals.

Habermas has focused mainly on the performatives and has established four classes of performatives:

> communicatives (e.g. say, express, speak, ask, mention), which express the pragmatic meaning of utterances qua utterances; constatives (e.g. state, assert, describe, explain), which explicate the meaning of statements qua statements; representatives (e.g. admit, confess, conceal, deny), which are used with propositional contents containing intentional verbs (e.g. like, wish, want) to explicate the meaning of the self-representation of the speaker before the hearer; and regulatives (e.g. command, forbid, allow, warn), which explicate the meaning of the speaker/hearer's relation to rules which can be followed or broken.[30]

Habermas says every speech act involves, explicitly or implicitly, a performative. These four categories, then, can be used to classify every speech act, and the mastery of these categories is a mark of communicative competence.

At the same time, Habermas says, every speech act contains all of at least four types of validity claims: that the propositional content of the utterance is true, that the utterance is understandable, that the speaker is acting sincerely and honestly, and that the speaker has a right to speak and to say what he is saying. Habermas says these claims of validity can be divided into two levels of communication: "a) the level of intersubjectivity on which the speaker and hearer, through illocutionary acts, bring about the interpersonal relationships which allow them to achieve mutual understanding and b) the level of objects in the world, or states of affairs about which they would want to achieve a consensus in terms of the communicative role as laid down in a)."[31]

The validity claims are almost never expressed, and usually are taken for granted by participants in a speech act, but in some circumstances the normal consensus about the validity of these claims can be disturbed. In that case, further speech acts become a process of renegotiating the consensus. In this continuing interaction, the claims of comprehensibility and veracity take care of themselves; either they are established or it becomes obvious to the participants that utterances in the speech acts are not understandable or are not sincerely motivated. "The validity of problematic truth claims or of problematic norms, however, can be redeemed discursively and only discursively, that is, by entering into a discourse, which has the sole purpose of

judging the truth of the problematic opinion or the correctness of the problematic norm."[32] Thus Habermas sees the necessity for arriving at a consensus about validity claims in language as the motivation for discourse; at the same time, he defines truth as a rational consensus arrived at through discourse.

Not all discourse leads unerringly to truth, however; only that discourse that best approximates the "ideal speech situation"implied in the structure of language. The conditions of the "ideal speech situation" are that there is no form of domination or compulsion other than the weight of the more persuasive argument; every participant has an equal chance to choose and carry out possible speech acts; and every participant can change linguistic levels freely, moving from propositional and normative utterances to intentional and self-representative utterances. Only under these conditions can a consensus be rational. "The end result of this chain of argument is that the very structure of speech involves the anticipation of a form of life in which autonomy and responsibility are possible. 'The critical theory of society takes this as its point of departure.' "[33]

While the preceding discussion is a gross oversimplification of the development of Habermas' theory of communicative competence, it will serve to introduce the major concepts. The remaining task, then, is to examine how this theory can applied at the societal level, particularly to the development of political consensus in a democracy. Although Habermas

apparently conceived of speech acts as applying only on a purely interpersonal or small-group level, a number of writers have observed that the theory of communicative competence has societal implications.[34] "In a sense, what Freud was doing for the individual, Habermas wants to do for society: by rational reconstruction of the distorted symbolism--existing social ideologies (which correspond to the neurosis of the individual)--emancipation from domination is to be possible, and new norms developed and legitimized."[35]

What, then, are the implications of Habermas' theory for the consideration of communication in society and its regulation through norms of law? First, application of Habermas' theory and the principles in which it is grounded would require a holistic approach to the question of how public opinion is formed and a consensus is reached in a democracy. Traditionally, this has been viewed as a highly individualized process. "For communication scholars, the most conventional placement of the theory of argumentation and controversy is within the classical rhetorical tradition. The traditional view of rhetorical argument envisioned a union of wisdom and eloquence, thought and action best represented by the good citizen speaking well."[36]

This individualistic view is particularly pronounced in the United States. "Nowhere in the Western world--probably nowhere in the world--is there another society as epistemologically committed to an individualist perspective of social life. Americans tend to experience society as a collectivity of

conscious individuals ... To the American mind, the individual is the absolute building block of all social relations; to challenge this belief with collectivist concepts is condemned as anti-American and anti-freedom."[37] Even in America, though, there has been some recent accommodation with collectivist concepts, so that major legal theorists like Meiklejohn and Emerson have argued since World War II that granting individuals a right of expression also serves the interests of society as a whole by ensuring the free flow of information necessary for popular self-government.[38] Habermas, on the other hand, would advocate the critical theory position of Horkheimer and Adorno that the whole of society must be considered in assessing social rights; only by guaranteeing more justice in the society can individuals be more free.[39]

The second implication of Habermas' writings for legal decisions is that ultimate truth does not exist except as the outcome of a rational process.[40] Traditional Western legal theory accepts the existence of an external, objective reality. "The whole truth about the good life, however, exists <u>as fact</u> for Mill; once that truth is discerned, (accurately and fully) and explained (clearly and widely), all men with good sense will understand it and live by it."[41] The same notion of external reality--whether it resides in God or nature, leads to claims of "natural law," in which "the legal rules and principles are justified by resort to sources that are accepted because of their reputed age and

authenticity and to principles of social theory that are believed to be self-evidently valid."[42]

According to this view, characteristic of the Enlightenment, the way to arrive at rational social consensus is to give individuals greater technical skills at discovering objective reality. This leads to the growth of positivism and scientism, which Tigar refers to in speaking of "(t)he similarities, and increasing rapport, between the natural-law and positivist schools..."[43] Habermas maintains, however, that truth is not simply discovered; it is created, dialectically, in the process of discourse under the conditions of the "ideal speech situation."

Finally, the third implication of Habermas' theory for legal decision-making is that the "ideal speech situation" provides criteria for judging whether it is possible for the system of communication in a society to produce a rational consensus, and thus truth. On a societal level, the conditions necessary for an "ideal speech situation" include at least these: that every member of society have equal opportunity to engage in public speech and to choose what form of speech to perform; that every member of society can freely choose to participate on either linguistic level, the level of intersubjectivity or the level of things in the world; and that there be no form of domination or compulsion in the speech act.

THE 'COMMERCIAL SPEAKER' ISSUE

A problem that has arisen in American constitutional law only recently is whether corporations have the unrestrained right to engage in political communication. The question was first raised in the case of First National Bank of Boston v. Bellotti[44], decided by the U.S. Supreme Court April 26, 1978. The case was brought by the bank and four other corporations to challenge a Massachusetts law that prohibited them and other types of corporations from making contributions or expenditures "for the purpose of ... influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation." The plaintiffs wanted to spend money to advertise their position on a referendum before the Massachusetts voters on Nov. 2, 1976, that would have amended the Massachusetts Constitution to allow for a graduated income tax in that state. The Massachusetts legislature had included language in the prohibiting statute providing that any matter relating only to the taxation of individuals could not be one "materially affecting" a corporation.

The constitutionality of the statute was upheld through the Massachusetts courts, and the corporations appealed to the U.S. Supreme Court, claiming their rights had been violated under the First and Fourteenth amendments. In a 5-4 decision, the Supreme Court overturned the lower court and held that the statute was unconstitutional.

The central question of the case, stated by Justice Powell

in his majority opinion, was "whether the corporate identity of the speaker deprives this proposed speech of what otherwise would be its clear entitlement to protection."[45] The majority reasoned that the "marketplace of ideas" was served by allowing the corporations to engage in political speech. "If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual."[46]

In subsequent cases, the Supreme Court, citing the Bellotti case as controlling, has struck down a ban on the use of political messages inserted in utility bills and another statute that forbade the inserting of any kind of message in utility bills.[47]

APPLYING HABERMAS TO 'COMMERCIAL SPEAKERS'

What would be the implications of applying the principles embodied in Habermas' theory of communicative competence to the question of commercial speakers? It seems obvious that the Supreme Court would have used a different rationale and would have arrived at a different conclusion.

First, the court would have had to take a strictly collectivist view of the interests served by the First Amendment. While it can be said that the court in Bellotti at least acknowledged societal interests in referring to the kind of speech necessary for self-government, nevertheless the court

essentially decided an individual-rights question: whether corporations are entitled to claim the status of individuals in regard to political speech.[48] And, even in its reference to the protection of the societal interest in the free flow of information, the court retained an atomistic view of society. It assumed that societal decision-making operates on the model of the town meeting, in which every listener can tell which view is right if only enough views are put forward to ensure that the right one is included. One observer says the most significant effect of the Bellotti ruling was "the switch in focus from the right of the speaker ... to the right of the listener to receive a particular message."[49] This is still an individualist perspective, though.

In applying Habermas, this viewpoint would have to be reversed. The proper model of society, according to Habermas, is that it is a whole made up of relations, and that the members of society do not interact as individuals but as integrated parts of relationships.

Second, applying Habermas' theory in the "commercial speaker" cases would require the court to abandon the notion that truth is existent outside the process used to seek it. This would require the court to abandon both the "marketplace" metaphor and the "information necessary for self-government" justification for its original ruling; both assume that there is a right view or a true answer that can be discovered by a rational individual taking in information and weighing it

analytically. Habermas' theory would require turning "a very specific focus of attention upon, not the fact of consensus, but rather the processes whereby consensus is produced."[50] This would require a more thorough examination of the circumstances surrounding an individual act of political speech.

This would lead, then, to a requirement that the court consider, in each case, whether the requirements of "rational discourse," as Habermas defined it, are enhanced or suppressed by the speech act being considered. Each of the conditions necessary for rational discourse could become a central issue, even the implicit condition of equal comprehensibility in cases such as those dealing with how radio or television frequencies are allocated and safequarded from interference. However, in most cases, as in the "commercial speaker" cases, the principal question will be whether the individual speech act or its regulation would promote or suppress equality of access and influence in the communication situation.

In the Bellotti case, then, an application of Habermas' "ideal speech situation" conditions would have lead to a restatement of the central question: "Will the speech regulation challenged herein lead to a more rational discourse, and therefore promote construction of social truth while enhancing the individual autonomy of society's members, more than the speech act would if it went unregulated?"

In fact, the court in Bellotti recognized the possibility of an approach very similar to the one outlined here, but

the majority rejected it. "According to appellee, corporations are wealthy and powerful and their views may drown out other points of view. If appellee's arguments were supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests, these arguments would merit our consideration."[51]

Justice White, in his dissent, argued that Massachusetts did prove its interest in "preventing institutions which have been permitted to amass wealth as a result of special advantages extended by the State for certain economic purposes from using that wealth to acquire an unfair advantage in the political process . . . The State need not permit its own creation to consume it."[52] In addition, a number of comments on the Bellotti ruling have warned of the danger of economic domination in a political-speech setting.[53]

Thus, adopting Habermas' perspective on political discourse would require reversal of the Supreme Court's position on Bellotti and other "commercial speaker" cases. However, it would also have a much broader implication in requiring government actions to equalize access to public debate and the means of engaging in political discourse without dominance. As Morris has suggested, there are at least two ways government might justifiably interfere. It could take action to increase the ability of individuals to make themselves understood and to assess the veracity of other speakers: "Since just laws implement the public's

aspirations, justice can be realized only when there exists a public capable of aspiring."[54] And the government also might require the economically advantaged to support the communication needs of the disadvantaged. "Nongovernmental elites sometimes exercise powers much like law-making ... When these powers are used to thwart the public's aspirations, they produce injustice ... Public toleration of their power implied by their position obliges them to implement some of the public's aspirations."[55]

CONCLUSION

This paper has attempted to sketch how the critical theory perspective of Jurgen Habermas could be applied in a specific First Amendment law situation. It is obvious that many important issues have not been dealt with. The most fundamental of these is the necessity for developing a critical theory of the existence of law as an institution and its relation to society as a whole.

At least one writer denies the possibility that a sociology of law based on critical theory and Marxist principles can be developed.[56] However, the first efforts at establishing such a theory have already been begun.[57] In view of the importance of law in contemporary Western societies, this seems to be an especially appropriate task for critical theorists.

Notes

[1] Fred R. Dallmayr, Beyond Dogma and Despair: Toward a Critical Phenomenology of Politics (Notre Dame: University of Notre Dame Press, 1981), p. 3.

[2] Phil Slater, Origin and Significance of the Frankfurt School: A Marxist Perspective (London: Routledge and Kegan Paul, 1977), p. xvi.

[3] 435 U.S. 765.

[4] Hubert Rottleuthner, "The Contribution of the Critical Theory of the Frankfurt School to the Sociology of Law," in Adam Podgorecki and Christopher J. Whelan, eds., Sociological Approaches to Law (New York: St. Martin's Press, 1981), p. 115.

[5] Don Martindale, The Nature and Types of Sociological Theory, 2nd ed. (Boston: Houghton Mifflin, 1981), p. 517.

[6] Martin Jay, The Dialectical Imagination: A History of the Frankfurt School and the Institute of Social Research 1923-1950 (Boston: Little Brown, 1973); Martindale, pp. 513-519; Slater.

[7] Thomas B. Farrell and James A. Aune, "Critical Theory and Communication: A Selective Literature Review," The Quarterly Journal of Speech 65 (1979): 93-120.

[8] Rottleuthner, p. 112.

[9] Ibid., p. 113.

[10] Ibid., pp. 113-114.

[11] Ibid., p. 111.

[12] Karl Renner, The Institutions of Private Law and Their Social Function (London: Routledge and Kegan Paul, 1949), p. 58.

[13] Thomas Mathiesen, Law, Society and Political Action: Towards a Strategy Under Late Capitalism (London: Academic Press, 1980).

[14] Farrell and Aune, pp. 98, 103-106.

[15] Herbert Marcuse, An Essay on Liberation (Boston: Beacon Press, 1969), p. 15.

[16] Claus Mueller, The Politics of Communication (London: Oxford University Press, 1973).

[17] Hans Magnus Enzensberger, The Consciousness Industry: On Literature, Politics and the Media (New York: Seabury, 1974).

[18] Martindale, p. 533; Habermas' works are listed in Rene Gortzen and Frederik van Gelder, "Jurgen Habermas: The Complete Oeuvre, a Bibliography of Primary Literature, Translations and Reviews," Human Studies 2 (1979): 285-300.

[19] Martindale, p. 533.

[20] Theory and Practice, trans. John Viertel (Boston: Beacon Press, 1973).

[21] Peter Uwe Hohendahl, "Critical Theory, Public Sphere and Culture: Jurgen Habermas and His Critics," New German Critique 16 (Winter 1979): 89-118.

[22] Toward a Rational Society, trans. Jeremy J. Shapiro (Boston: Beacon Press, 1970), p. 75.

[23] Hohendahl, p. 94.

[24] Martindale, p. 533.

[25] This theory is developed principally in "Towards a Theory of Communicative Competence," Inquiry 13 (Winter 1970):

360-375; "On Systematically Distorted Communication," Inquiry 13 (Autumn 1970): 205-218; Knowledge and Human Interests, trans. Jeremy Shapiro (Boston: Beacon Press, 1971); and "Some Distinctions in Universal Pragmatics: A Working Paper," Theory and Society 3 (Summer 1976): 155-169.

[26] Thomas A. McCarthy, "A Theory of Communicative Competence," in Paul Connerton, ed., Critical Sociology (New York: Penguin Books, 1976), pp. 470-497; Rottleuthner, pp. 115-122.

[27] Habermas, "Some Distinctions in Universal Pragmatics," p. 156.

[28] McCarthy, p. 473.

[29] McCarthy, p. 474.

[30] McCarthy, pp. 474-475.

[31] Habermas, "Some Distinctions in Universal Pragmatics," p. 157.

[32] McCarthy, p. 476.

[33] McCarthy, p. 495.

[34] See, for example, Richard J. Bernstein, The Restructuring of Social and Political Theory (New York: Harcourt Brace Jovanovich, 1976), p. 199; Joseph W. Wenzel, "Jurgen Habermas and the Dialectical Perspective on Argumentation," Journal of the American Forensic Association 16 (Fall 1979): 83-94.

[35] Thomas R. Nilsen, rev. of Communication and the Evolution of Society, by Jurgen Habermas, Journal of the American Forensic Association 16 (Fall 1979): 138-139.

[36] Thomas B. Farrell, "Habermas on Argumentation Theory:

Some Emerging Topics," Journal of the American Forensics Association 16 (Fall 1979): 78.

[37] J.W. Freiberg, ed., Critical Sociology: European Perspectives (New York: Irvington Publishers, 1979), p. 7.

[38] Zechariah Chafee Jr., Free Speech in the United States (Cambridge, Mass.: Harvard University Press, 1941), pp. 3-35; Leonard W. Levy, Legacy of Suppression: Freedom of Speech and Press in Early American History (Cambridge, Mass.: Belknap Press, 1960), pp. 247-320; Thomas I. Emerson, Toward a General Theory of the First Amendment (New York: Random House, 1963).

[39] Martindale, p. 520.

[40] McCarthy, p. 481.

[41] Clarence Morris, The Justification of the Law (Philadelphia: University of Pennsylvania Press, 1971), p. 73.

[42] Michael E. Tigar with Madeleine R. Levy, Law and the Rise of Capitalism (New York: Monthly Review Press, 1977), p. 283.

[43] Tigar, p. 295.

[44] 435 U.S. 765. This case is distinct from a line of "commercial speech" cases (including, among others, Valentine v. Chrestensen, 316 U.S. 52; Bigelow v. Virginia, 421 U.S. 809; Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748) in which the central question is whether the commercial nature of the content of a communication deprives the communication of the full protection of the free speech clause of the First Amendment.

[45] 435 U.S. 765, at 778.

[46] 435 U.S. 765, at 777.

[47] Central Hudson Gas and Electric Corp. v. Public Service Commission, 447 U.S. 557; Consolidated Edison Co. v. Public Service Commission, 447 U.S. 530.

[48] "The Corporation and the Constitution: Economic Due Process and Corporate Speech," Yale Law Journal 90 (1981): 1833-1860.

[49] "PACing the Burger Court: The Corporate Right to Speak and the Public Right to Hear After First National Bank v. Bellotti," Arizona Law Review 22 (1980): 429.

[50] Alan Hunt, "Perspectives in the Sociology of Law," in Pat Carlen, ed., The Sociology of Law, Sociological Monograph 23 (Keele: University of Keele, December 1976), p..39.

[51] 435 U.S. 765, at 789.

[52] 435 U.S. 765, at 809.

[53] See, for example, William Patton and Randall Barrett, "Corporate 'Persons' and Freedom of Speech: the Political Impact of Legal Mythology," Wisconsin Law Review (1981): 494-512; "Confessions of a Horizontalist: A Dialogue on the First Amendment," University of Kansas Law Review 27 (1979): 541-590; "Corporate Spending on State and Local Referendums: First National Bank of Boston v. Bellotti," Case Western Reserve Law Review 29 (1979): 808-831; "The Constitutionality of the Federal Corrupt Practices Act After First National Bank of Boston v. Bellotti," American University Law Review 28 (1979): 149-175.

[54] Morris, p. 2.

[55] Morris, p. 3.

[56] Piers Beirne, "Marxism and the Sociology of Law: Theory or Practice?" in The Sociology of Law: A Conflict Perspective, eds. Charles E. Reasons and Robert M. Rich (Toronto: Butterworth and Co., 1978), pp. 471-475.

[57] Renner; Raimo Blom, "On the Foundations of the Materialistic Theory of State and Law," in Vilhelm Aubert, ed., Sociology of Law (New York: Penguin, 1969), pp. 81-95.